Citation: *MM v Minister of Employment and Social Development*, 2022 SST 1395

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	M. M.
Respondent:	Minister of Employment and Social Development
Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated February 3, 2021 (issued by Service Canada)

Tribunal member:	Salima Stanley-Bhanji
Type of hearing:	Teleconference
Hearing date:	June 27, 2022
Hearing participants:	Appellant Minister's representative
Decision date:	September 27, 2022
File number:	GP-21-719

Decision

[1] The appeal is dismissed.

[2] The Appellant, M. M., isn't eligible for an Old Age Security (OAS) pension.

[3] This decision explains why I am dismissing the Appellant's appeal.

Overview

[4] The Appellant was born in Iran on X 1949. After turning 18, he lived in the U.S., Iran, and the Netherlands. He moved to Canada as a landed immigrant on May 8, 1988, with his wife and children.[1]

[5] After living in Canada, the Appellant then moved to the U.S., where he lives now.

The Appellant's application for an OAS pension

[6] The Appellant applied for an OAS pension in November 2014.[2]

[7] In August 2015, the Minister of Employment and Social Development (Minister) awarded the Appellant a partial OAS pension of 24/40 of the full amount, with payment to start in September 2015.[3]

[8] The award was based on the Appellant having resided in Canada for 20 years, which is the minimum required by the *Old Age Security Act* (OAS Act) where a recipient resides outside of Canada.[4]

The decision being appealed

[9] In 2017, the Minister started investigating whether the Appellant met the residence requirements for the OAS pension.[5] The Minister can investigate a file after the application has been approved. If the Minister decides someone didn't actually meet the requirements for receiving an OAS benefit, the Minister can decide the person

[1] See GD2-34 and GD2-65.
[2] See GD2-32 to GD2-37.
[3] See GD2-48 to GD2-51.
[4] Section 3(2)(b) of the Old Age Security Act (OAS Act) sets out this rule.
[5] See GD2-118.

wasn't eligible and will try to recover any payments that should not have been made. That is what happened to the Appellant.

[10] In September 2017, the investigation was completed. The Minister decided that, when the Appellant's OAS application was approved, he had not resided in Canada for 20 years and was living in the U.S. That meant he wasn't eligible for an OAS pension.[6] The Minister asked the Appellant to repay the amounts already paid to him.[7]

[11] The Appellant asked the Minister to reconsider the decision. In February 2021, the Minister issued a reconsideration decision and upheld its original decision.[8]

[12] The Appellant appealed to the General Division of the Social Security Tribunal.

What the Appellant must prove

[13] To receive a **full** OAS pension, the Appellant has to prove he resided in Canada for at least 40 years after he turned 18.[9] This rule has some exceptions. But the exceptions don't apply to the Appellant.[10]

[14] If the Appellant doesn't qualify for a full OAS pension, he might qualify for a **partial** pension. A partial pension is based on the number of years (out of 40) that a person resided in Canada after they turned 18. For example, a person with 15 years of residence gets a partial pension of 15/40 the full amount. To get a partial pension, a person must have resided in Canada for at least 10 years after they turned 18.

[15] When a person resides outside of Canada, an OAS pension is only payable if the recipient resided in Canada for at least 20 years. This is called a *portable* pension because it can be paid while someone is living in another country.

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[6] See GD2-113 to GD2-120.
[7] See GD2-13 to GD2-14.
[8] See GD2-3.
[9] See section 3(1)(c) of the OAS Act. The Appellant also has to be at least 65 years old and a Canadian citizen or legal resident of Canada. And he must have applied for the pension. The Appellant has met these requirements.
[10] See section 3(1)(b) of the OAS Act.

[16] The OAS Act gives the Minister the ability to enter into agreements with other countries so that periods of time spent in another country can count towards the 20-year requirement.[11]

[17] An agreement between Canada and the U.S. allows periods of coverage under the U.S. social security scheme to count towards eligibility for (but not the amount of) an OAS pension in Canada. This means that the Appellant, who no longer resides in Canada, can count residency time in the U.S. towards the 20-year requirement. However, if there are periods where the Appellant was covered by the U.S. social security scheme while still residing in Canada, then the U.S. residency time won't be counted towards the 20 years because this would mean counting the same period of time twice.

[18] The parties don't agree on the Appellant's eligibility for a portable, partial pension.

[19] The Minister submits that the Appellant resided in Canada from May 8, 1988 to August 31,1999, a total of 11 years and 116 days.[12] The Minister submits that the Appellant has 8 years and 0 days of coverage in the U.S. as confirmed by the US Social Security Office. This means the Appellant's total time of residence in Canada and coverage in the U.S. is 19 years and 116 days, according to the Minister. This falls short of the 20-year requirement.

[20] The Appellant stated on his OAS application that he resided in Canada from May 8, 1988, to July 30, 2012.[13] Later, in July 2017, September 2020, and at the hearing, the Appellant stated that he resided in Canada until August 2001. This was based on when he received his U.S. green card.[14]

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[11] See section 40(1) of the OAS Act.
[12] See GD4-2 to GD4-10.
[13] See GD2-34.
[14] See GD2-186 and GD2-7.

[21] The Appellant has to prove that he has met the 20-year requirement (by either residing in Canada or having coverage in the U.S.) on a balance of probabilities. This means he has to show that it's more likely than not he has met the 20-year requirement.

Reasons for my decision

[22] I find that the Appellant resided in Canada for a period of 12 years and 85 days and was covered by U.S. social security for a total of 7 years and 0 days. The total amount of time is 19 years and 85 days. As a result, the Appellant isn't eligible for a partial, portable OAS pension.

[23] Here are the reasons for my decision.

– The Minister can change its initial decision to approve the Appellant's OAS pension

[24] The Minister has the authority to investigate an applicant's eligibility for an OAS pension after it is awarded, change the initial decision about whether an applicant should have qualified for an OAS pension, and require an applicant to pay back amounts they should not have received.[15]

The test for residence

[25] The law says that being present in Canada isn't the same as residing in Canada. "Residence" and "presence" each have their own definition. I have to use these definitions in making my decision.

[26] A person **resides** in Canada if they make their home and ordinarily live in any part of Canada.[16]

[27] A person is **present** in Canada when they are physically present in any part of Canada.[17]

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[15] See section 23(2) of the *Old Age Security Regulations* (OAS Regulations); section 37(1) of the OAS Act; and *Canada (Attorney General) v Burke*, 2022 FCA 44.
[16] See section 21(1)(a) of the OAS Regulations.
[17] See section 21(1)(b) of the OAS Regulations.

[28] When I am deciding whether the Appellant resided in Canada, I have to look at the overall picture and factors such as:[18]

- where he had property, like furniture, bank accounts, and business interests
- where he had social ties, like friends, relatives, and membership in religious groups, clubs, or professional organizations
- where he had other ties, like medical coverage, rental agreements, mortgages, or loans
- where he filed income tax returns
- what ties he had to another country
- how much time he spent in Canada
- how often he was outside Canada, where she went, and how much time he spent there
- what his lifestyle was like in Canada
- what his intentions were

[29] This isn't a complete list. Other factors may be important to consider. I have to look at **all** the Appellant's circumstances.[19]

When the Appellant resided in Canada

[30] The Appellant **resided in Canada** from May 8, 1988, to August 31, 1999.

[31] The Appellant **resided in Canada** from September 1, 1999, to July 31, 2000.

[32] The Appellant **didn't reside in Canada** from August 1, 2000 to August 13, 2001.

[33] I will now discuss each period above, starting with the earliest one. For each period, I will explain why I have decided that the Appellant did or didn't reside in Canada.

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[18] See *Canada (Minister of Human Resources Development) v Ding*, 2005 FC 76. See also *Valdivia De Bustamante v Canada (Attorney General)*, 2008 FC 1111; *Duncan v Canada (Attorney General)*, 2013 FC 319; and *De Carolis v Canada (Attorney General)*, 2013 FC 366.
[19] See *Canada (Minister of Human Resources Development) v Chhabu*, 2005 FC 1277.

Residence

– **The Appellant resided in Canada from May 1988 to August 1999**

[34] The Appellant resided in Canada from May 8, 1988, to August 31, 1999.

[35] The Appellant was living in the Vancouver Lower Mainland with his family. Both parties agree the Appellant resided in Canada during this period.

[36] I find that the Appellant resided in Canada during this period.

– **The Appellant resided in Canada from September 1999 to July 2000**

[37] The Appellant resided in Canada from September 1, 1999, to July 31, 2000.

[38] At the hearing, the Appellant said he opened up and started working at X in Bellingham, U.S. in the fall of 1999.[20] He received a small amount of U.S. earnings that year.[21]

[39] The Appellant commuted to work each day from the Lower Mainland in Canada where he had purchased a home in 1996.[22] The Appellant said he continued the cross border commute to every work day until August 2001, when he got his U.S. green card.

[40] The Minister says that the Appellant moved to the U.S. in September 1999 when he began working in Bellingham, and that he was no longer residing in Canada from that time onward. The Minister says that the lack of entries into Canada logged in the Canada Border Services Agency (CBSA) records are proof that the Appellant wasn't commuting between the U.S. and Canada to work and in fact lived in the U.S.[23]

[41] No exit information is logged for Canadian or U.S. citizens when they leave Canada. It wasn't until August 2000 that CBSA records began to include entries into

[20] See GD2-209 and the hearing recording.
[21] See GD2-21.
[22] See GD2-206.
[23] See GD4-8.

Canada.[24] After August 2000 and until August 2001, only one entry into Canada is logged in the Appellant's CBSA record.[25]

[42] At the hearing, the Appellant gave details of his commute to and from Bellingham. He used one of two border crossings. He said he never showed his passport. He was very often waved through by familiar immigration officials. He shared that he would sometimes run into the immigration officials while they were having lunch in Bellingham. The majority of the time, the immigration officials knew who he was when he was crossing the border. If on the rare occasion he was told to go inside at the border by a new officer, he would see another officer he knew inside, who would ask him what he was doing there, and then send him on his way.

[43] Even if the Appellant was almost always waved through by immigration officials, or if CBSA entries weren't always logged at the border crossings the Appellant used, I am not convinced that only one entry would be logged from August 2000 to August 2001, if the Appellant was commuting to Bellingham for work Tuesday through Saturday, as stated at the hearing.

[44] The Appellant stated that after moving to the U.S., he still went back to Canada every week until 2012 when he sold their house.[26] While there are a lot of entries into Canada between 2009 and 2012, there is only one entry logged from 2000 to 2008.[27]

[45] As a result, the lack of correlation between the CBSA records and the Appellant's testimony in general puts into question both the Appellant's presence in Canada for all time periods in question, as well as the CBSA's actual practices at the relevant times recording entries into Canada at commuter border crossings.

[46] The Minister says that an article published in October 2006 by the *Bellingham Business Journal* reported on the Appellant moving to Bellingham in 1998.[28] The

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[24] See GD2-108.
[25] See GD2-110.
[26] See GD2-184.
[27] See GD2-110.
[28] See GD2-341 to GD2-342 and GD4-8.

Appellant said the article didn't correctly report the date he moved to the U.S. I agree with the Appellant. The Appellant was still working in Canada in 1998 and wasn't working in the U.S., which is clearly shown in his reported income on his Canadian T4 for that year and also in the U.S. Social Security Coverage Record.[29] He also consistently gave evidence that he started working in the U.S. in 1999 and I accept this testimony. As a result, I have placed no weight on the article as I don't believe the Appellant moved to the U.S. in 1998.

[47] The Minister says that the Appellant received rental income from 2000 to 2002 inclusive and that this is proof the Appellant was renting out his home and didn't live in Canada during this period.[30] The Appellant said he owned a 5,700 square foot home where he was living with his family (four children and his wife) during this period. The Appellant said that his wife began renting out the 2-bedroom basement suite of their home for $850 to $900 a month in 2000 after a renovation to create a secondary suite.[31] The amount of reported income on tax returns for these years are compelling evidence of the rental of a basement suite, not the entire home.[32] In addition, the Appellant shared that he would not have been able to maintain a separate residence in the U.S. away from his family because they could not afford it.[33]

[48] The Appellant said he paid the utilities and property taxes for the house.[34] The Minister says the lack of utilities documents from 1998 to 2012 are further proof that the Appellant wasn't living in Canada.[35] Given that the utilities documents are from more than 20 years ago, I find it reasonable that the Appellant wasn't able to provide them.

[49] The Appellant got coverage through British Columbia's Medical Services Plan as of June 1999.[36] The Appellant said he had a doctor he saw infrequently at a clinic in

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[29] See GD2-122 and GD2-21.
[30] See GD4-9.
[31] See the hearing recording.
[32] See GD2-122 to 131.
[33] See the hearing recording.
[34] See the hearing recording.
[35] See GD4-9.
[36] See GD2-140.

Maple Ridge in the Lower Mainland.[37] He said that he attended the Masonic Family Temple in Maple Ridge in the Lower Mainland every third Wednesday of the month.[38] He owned and insured a car. The car was insured in British Columbia from 1999 to 2012.[39] The Appellant consistently held a valid British Columbia driver's licence.[40]

[50] The Appellant said his three older children attended school at X in the Lower Mainland, and his youngest child stayed at home with his wife.[41] At the hearing, he stated that he never stayed a single night in Bellingham. On Sundays and Mondays, his days off work each week, he would spend time with his family, take his kids to school or the doctor and catch up on life administration.

[51] The Appellant stated at the hearing that he had no friends, no family, and wasn't part of any community groups in Bellingham. He didn't have a place to stay or own property there. He didn't have a doctor. At the hearing, the Appellant explained that he was in Bellingham to do his job and was anxious to get back home to his family in the Lower Mainland after each work day. He arrived in Bellingham at 10AM each work day to open the store, and would leave at 6PM when he closed the store.

[52] The Appellant continued to have significant ties to Canada and an absence of ties to the U.S. during this period. The Appellant had been consistently residing in Canada as of May 1988. Even if the Appellant wasn't consistently present in Canada for the entire period, I don't believe he had properly set up his life in the U.S. as yet, and I conclude that he was still resident in Canada.

– **The Appellant didn't reside in Canada from August 2000 to August 2001**

[53] The Appellant didn't reside in Canada from August 1, 2000, to August 13, 2001.

[54] I accept the Appellant's testimony that he commuted between the Lower Mainland and Bellingham for a time after he started working at the Bellingham store.

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[37] See the hearing recording.
[38] See GD2-208 and the hearing recording.
[39] See GD2-142.
[40] See GD2-194.
[41] See the hearing recording.

From the evidence provided, it was difficult to decide at exactly what point the Appellant stopped commuting for work and began living in the U.S.

[55] As of August 1, 2000, the CBSA started logging entries into Canada. However, the CBSA records show only one entry into Canada from August 2000 to August 2001, even though the Appellant says he was commuting across the border every work day. While it is possible that CBSA agents had not begun to regularly log entries when the directive to do so was first made, I have no evidence to support this, and the burden is on the Appellant to prove they were residing in Canada during this period.

[56] In his July 2017 OAS questionnaire, the Appellant said he would not have been able to live in the U.S. without a green card, but he did have a work permit which allowed him to live and work in the U.S.[42]

[57] While the Appellant submits that he wasn't living in the U.S. until he received his green card in August 2001, I find the Appellant didn't prove that it was more likely than not that he was residing in Canada during this period.

– **The Appellant has periods of coverage in the U.S. that count towards residency**

[58] The Appellant has periods of coverage in the U.S. that count towards residency.

[59] The *Agreement Between the Government of Canada and the Government of the United States of America with Respect to Social Security* (Treaty) allows periods of coverage under the U.S. social security scheme to count towards eligibility for (but not the amount of) an OAS pension in Canada.[43] Four quarters of coverage are equal to one year of residence in Canada.

[60] Since turning 18 on September 3, 1967, until 2006, the Appellant has 35 quarters of coverage in the U.S.[44]

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[42] See GD2-183 and the hearing recording.
[43] See Treaty E102215, the *Agreement Between the Government of Canada and the Government of the United States of America with Respect to Social Security* (Treaty).
[44] See GD2-21 to GD2-22.

[61] This means that the Appellant can count this U.S. coverage towards the 20-year requirement. However, the same period of time can't be counted twice. If there are periods where the Appellant was subject to the U.S. social security scheme while they were residing in Canada, the U.S. quarters won't be counted towards the 20 years.[45]

[62] In 1999, when the Appellant was residing in Canada, there were four overlapping quarters. In 2000, when the Appellant was residing in Canada, there were three overlapping quarters. This is a total of seven overlapping quarters. When these seven overlapping quarters are deducted from the 35 total quarters, 28 quarters remain. This is a total of seven years of U.S. coverage.

– **The combination of residency time and U.S. coverage doesn't qualify the Appellant for an OAS pension**

[63] The combination of actual residence in Canada and U.S. coverage doesn't qualify the Appellant for an OAS pension.

[64] The Appellant actually resided in Canada for 12 years and 85 days. In addition, he had 7 years and zero days of U.S. coverage. Together, the Appellant had 19 years and 85 days to count towards the 20-year residency requirement for a portable, partial OAS pension.

[65] Because the Appellant didn't meet the 20-year requirement when his application was approved, his pension isn't portable. This means the pension can't be paid to him because he doesn't live in Canada.

– **Even if the Appellant resided in Canada until the time he has claimed, he still would not qualify for an OAS pension**

[66] Even if the Appellant resided in Canada until the time he received his U.S. green card in August 2001, he still would not qualify for an OAS pension.

[67] The Appellant was covered by the U.S. scheme from August 2000 to August 2001. Because of this, even if the Appellant had resided in Canada for that period, this

[45] See Article VIII of the Treaty.

would not provide any extra residency time to the Appellant and would not help the Appellant reach the 20 years of time needed for a portable, OAS pension. Periods of residency in Canada cancel out overlapping periods of coverage in the U.S. In this case, this means the overall total of residency time remains unchanged.

[68] For me to be able to decide that the Appellant was eligible for a portable, partial OAS pension, I would have to find that he resided in Canada before 1988 or after 2006. The Appellant hasn't made any submissions in that regard. Though he initially stated in 2014 that he resided in Canada until 2012, the Appellant later stated that he left Canada and began residing in the U.S. from the time when he received his green card in August 2001. He shared that he had mistakenly thought he resided in Canada because he owned property and paid property tax in Canada.[46] I accept this testimony.

[69] Falling short of the 20-year requirement means the Appellant isn't eligible for an OAS pension and must also pay back what he has received. This decision is an unfortunate one to make because the Appellant is so close to the 20-year threshold.

[70] I am bound to apply the law, including the directions set out in the Treaty. In doing so, I recognize this unfortunate outcome for the Appellant.

Conclusion

[71] The appeal is dismissed.

Salima Stanley-Bhanji
Member, General Division – Income Security

[46] See GD2-184.